

Kathleen Hartnett White, *Chairman*
Larry R. Soward, *Commissioner*
H. S. Buddy Garcia, *Commissioner*



Blas J. Coy, Jr., *Public Interest Counsel*

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

August 14, 2007

LaDonna Castañuela, Chief Clerk
Texas Commission on Environmental Quality
Office of the Chief Clerk (MC-105)
P.O. Box 13087
Austin, TX 78711-3087

CHIEF CLERKS OFFICE

2007 AUG 14 PM 4:52

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

Re: Application of Lazy Nine Municipal Utility District and Forest City Sweetwater Limited Partnership for Proposed Permit WQ0014629001
SOAH Docket No. 582-06-2596
TCEQ Docket No. 2006-0688-MWD

Dear Ms. Castañuela:

Enclosed for filing in the above-referenced matter is the Office of Public Interest Counsel's Exceptions. We are re-filing the same exceptions filed on May 14, 2007, at the request of the Office of General Counsel of the TCEQ to serve our Exceptions on John Hatchett, Hazel A. Sanchez, and William H. Cahill, who were not included on our May 14, 2007, service list. The May 14, 2007, service list only included the representative of the "Travis Settlement Alignment" pursuant to Administrative Law Judge William G. Newchurch's Order No. 1.

Sincerely,

A handwritten signature in cursive script, appearing to read "Emily A. Collins".

Emily A. Collins, Attorney
Office of Public Interest Counsel

Cc: Mailing List

Enclosure

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P.O. Box 13087 • Austin, Texas 78711-3087 • 512-239-1000 • Internet address: www.tceq.state.tx.us

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MAILING LIST
LAZY NINE MUNICIPAL UTILITY DISTRICT AND
FOREST SWEETWATER LIMITED PARTNERSHIP
SOAH DOCKET NO. 582-06-2596
TCEQ DOCKET NO. 2006-0688-MWD

The Honorable William G. Newchurch
Administrative Law Judge
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Larry R. Soward, *Commissioner*
H. S. Buddy Garcia, *Commissioner*



Blas J. Coy, Jr., *Public Interest Counsel*

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

May 14, 2007

The Honorable William G. Newchurch
Administrative Law Judge
State Office of Administrative Hearings
P.O. Box 13025
Austin, Texas 78711-3025

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY
2007 MAY 14 PM 2:03
CHIEF CLERK'S OFFICE

RE: **LAZY NINE MUNICIPAL UTILITY DISTRICT AND
FOREST SWEETWATER LIMITED PARTNERSHIP
SOAH DOCKET NO. 582-06-2596; TCEQ DOCKET NO. 2006-0688-MWD**

Dear Judge Newchurch:

Enclosed for filing is the Public Interest Counsel's Exceptions in the above-entitled matter.

Sincerely,

Emily A. Collins
by jla

Emily A. Collins, Attorney
Public Interest Counsel

cc: Mailing List

Enclosure

REPLY TO: PUBLIC INTEREST COUNSEL, MC 103 • P.O. Box 13087 • AUSTIN, TEXAS 78711-3087 • 512-239-6363

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SOAH DOCKET NO. 582-06-2596
TCEQ DOCKET NO. 2006-0688-MWD

APPLICATION OF LAZY NINE	§	BEFORE THE STATE OFFICE
MUNICIPAL UTILITY DISTRICT AND	§	
FOREST CITY SWEETWATER	§	OF
LIMITED PARTNERSHIP FOR	§	
PROPOSED PERMIT NO. WQ0014629001	§	ADMINISTRATIVE HEARINGS

THE OFFICE OF PUBLIC INTEREST COUNSEL'S EXCEPTIONS

TO THE HONORABLE ADMINISTRATIVE LAW JUDGE:

COMES NOW, the Office of Public Interest Counsel (OPIC) of the Texas Commission on Environmental Quality (TCEQ or Commission), and submits the following Exceptions in the above-captioned matter and would respectfully show the following:

I. INTRODUCTION AND BACKGROUND

On May 17, 2006, Lazy Nine MUD requested a direct referral¹ to the State Office of Administrative Hearings pursuant to 30 TAC section 55.210(a) for a hearing on "whether the application complies with all applicable statutory and regulatory requirements."² The ALJ issued a Proposal for Decision received by OPIC on April 24, 2007, recommending that the Commission find that the Applicant had met its burden of proof on all issues. OPIC agrees that the permit should be issued, but disagrees with two of the recommended draft permit changes. In addition to the exceptions provided below, OPIC has attached its closing argument for the Commission to provide a fuller discussion of the issues presented in the PFD.

¹ Applicant's Ex. 3, Miertschin Ex. 3.

² 30 TAC § 55.210(b) (2006).

1. *Finding of Fact No. 76 regarding Special Provision 17.*

As with all wastewater permits, the Draft Permit in this case states that “[t]he application pursuant to which the permit has been issued is incorporated herein; provided, however, that in the event of a conflict between the provisions of this permit and the application, the provisions of the permit shall control.”³ Domestic Worksheet 3.0 of the application states that the proposed land use in the land application area is “rangeland with native grass, junipers, hardwood, and athletic fields.”⁴ In addition, the Supplemental Technical Report for Irrigation Disposal in the application states that “[a] relatively small fraction of the tract may be developed as athletic fields in the future.”⁵ Any future addition of “athletic fields” to the area used by the Applicant for wastewater irrigation raises significant questions as to how such a change would be processed.

The ED recognized the potential problems with inclusion of references to athletic fields in the application, and included Special Provision 17⁶ to provide that athletic fields could be

³ TCEQ Draft Permit No. WQ0014629001 (hereinafter “Draft Permit”), Permit Conditions, No. 9, page 8; *see also* Draft Permit, Permit Conditions, No. 1.b., page 6 (stating that “[t]his permit is granted on the basis of the information supplied and representations made by the permittee during action on an application....”).

⁴ Applicant’s Ex. 3, Miertschin Ex. 2, Worksheet 3.0.

⁵ *Id.* at Attachment K, 1.2.

⁶ SP 17 states the following: “Should the permittee develop athletic fields using wastewater, the permittee shall revise the permit, in a major amendment application, to indicate irrigation on public access lands and include the athletic fields as part of the area to be irrigated with the effluent. The permit application shall include a revised **Final Irrigation Management Plan**. The plan shall outline the location of the athletic fields, irrigation delivery method (spray or subsurface), the layout of the main lines of the irrigation system, the locations and coverage of each spray nozzle, wastewater dosing schedule, a proposal to prevent freezing, rupture or averting mechanical damage to the irrigation lines, and confirm the cover vegetation that will remove nutrients throughout the year. The plan shall include a weekly schedule of monitoring and inspecting the physical condition of the irrigation fields for any problems associated with surface runoff, erosion, and stressed or damaged vegetation, the results of which shall be recorded in a site log book and retained on the facility property for inspection. The plan shall indicate that corrective measures will be implemented immediately upon identification of problems related to surface erosion, stressed or damaged vegetation, or problems in maintaining an annual vegetative cover system that will use wastewater nutrients throughout the year.”

added to the application area only through a major amendment to the permit. In response, the Applicant requested that the ED reconsider this position regarding the need for a major amendment and merely allow the Applicant to submit a letter of notification upon development of the athletic fields. This "letter of notification" would include a revised Final Irrigation Management Plan.⁷ The ED provided the following response:⁸

The current permit application only mentions athletic fields, but does not provide any other details in the technical reports, attachments or maps. Consequently, the evaluation of the permit application does not include any proposed athletic fields. We have no knowledge, for example, of the location and size(s) of the proposed fields. A letter of notification cannot amend a permit. Further, inclusion of the athletic fields to be authorized in a permit by simple notification bypasses the public notice step. Consequently, the current language in Special Provision No. 17 is retained.

The Applicant and the other settling parties have requested that the ALJ remove SP 17. The ALJ agreed with the parties that this special provision should be deleted. He stated his opinion that the provision does not enhance regulatory certainty or provide clarity because any future attempt to add the athletic fields to the permitted application area would be processed in accordance with the rules in place at that time.⁹ However, the language referring to the athletic fields in the application has been incorporated into the permit through the permit conditions.¹⁰ Deleting SP 17 disregards the ambiguity created by the application's reference to the athletic

⁷ Letter from Julian D. Centeno, Permit Coordinator, Municipal Permits Team, Wastewater Permitting Section, Water Quality Division, TCEQ to Mr. Mike Willatt regarding Lazy Nine Municipal Utility District and FC Sweetwater Partner, LLC, Draft TCEQ Permit No. WQ0014629001, dated March 31, 2006, page 3.

⁸ *Id.*

⁹ PFD at 26, 27.

¹⁰ TCEQ Draft Permit No. WQ0014629001 (hereinafter "Draft Permit"), Permit Conditions, No. 9, page 8; *see also* Draft Permit, Permit Conditions, No. 1.b., page 6 (stating that "[t]his permit is granted on the basis of the information supplied and representations made by the permittee during action on an application....").

fields. Clearly, the ED saw the need to address this ambiguity and clarify that: (1) the athletic fields are not included in the permit, and (2) the addition of any new irrigation areas can be done only through a major amendment. Moreover, OPIC cannot envision any set of future rule changes that would classify an Applicant's increase in its application area as anything other than a major amendment.¹¹ Furthermore, the language in SP 17 is similar to, but more specific than the permit amendment language already included in Permit Condition 4 on Page 7 of the Draft Permit. For these reasons, OPIC does not support the removal of Special Provision 17.

2. Finding of Fact No. 77 regarding Special Provision 18.

Currently, SP 18 of the draft permit provides that the Applicant must submit a Wastewater Treatment Plant Emergency Plan to TCEQ that addresses how the facility will meet the 30 TAC section 309.12(3).¹² The provision requires the permittee to "consider the case of emergency storage of effluent and/or containment structures around the treatment plant, emergency power generators, or lift stations in the case of emergency shut down of the plant or failure of the effluent storage tanks."¹³ The settling parties have requested the ALJ to revise the sentence quoted above¹⁴ to state the following:

The Applicant will provide a spill containment system for the wastewater treatment plant that will contain at least one day's volume of wastewater flows

¹¹ However, if the Commission shares the ALJ's concerns about the effect of future rulemaking, OPIC alternatively recommends including the following language to the end of SP 17: "Notwithstanding the requirements of this provision, or any other provision of this permit or the permit application, any requests for changes to this permit shall be processed according to the applicable laws and rules in place at the time of administrative completeness of the application."

¹² *Id.* at page 24.

¹³ *Id.*

¹⁴ Agreed Motion, Exhibit B, page 2.

(700,000 gallons), spill containment devices for the lift stations that are in the Bee Creek Watershed, a backup power generator integrated into the electrical control system of the wastewater treatment plant, and backup power generators integrated into the electrical control systems of the lift stations in the Bee Creek Watershed, and will equip the electric control systems of the wastewater treatment plant and the lift stations in the Bee Creek Watershed with autodial equipment and with visual and auditory alarm systems that will activate in the event of a power outage.

In OPIC's Closing Argument,¹⁵ we expressed concern that the mandatory emergency specifications provided in the revised version of the last sentence of SP 18 may present a conflict with a future approval process by the ED. By deleting the last sentence of SP 18 as it currently exists in the draft permit, and replacing it with a sentence that contains mandatory emergency measure requirements, the permittee no longer needs to "consider the case of emergency storage of effluent and/or containment structures around the treatment plant, emergency power generators, or lift stations in the case of emergency plant shut down of the plant or failure of the effluent storage tanks." What the ED had requested in the Emergency Plan is no longer required to be submitted in total because the revised last sentence specifies what the Settling Parties, including the Applicant, apparently believe will be adequate and where those emergency structures should be located (in the Bee Creek watershed).¹⁶ As written, the revised last sentence of SP 18 directs the permittee to provide certain emergency measures in particular places, rather

¹⁵ Attached as OPIC's Attachment A.

¹⁶ The record is somewhat unclear as to whether pumps would be located in both the Barton Creek watershed and the Bee Creek watershed. See Transcript page 416, lines 7-25, page 417, lines 1-17. However, Applicant's Exhibit 12 shows that the entire irrigation area will be within the Little Barton Creek watershed. Therefore, it is reasonable to assume that lift stations will be located within the Little Barton Creek watershed as well as the Bee Creek watershed.

than to submit an emergency plan to the ED for approval that considers emergency measures in the entirety of the wastewater facility.¹⁷

Furthermore, the record contains no discussion by any of the numerous experts in this case regarding what emergency equipment is needed to meet the requirements of 30 TAC section 309.12. Even if the Settling Parties requests are above and beyond the requirements of 30 TAC, Chapter 317 as found in *dicta* by the ALJ,¹⁸ the record gives no indication of the minimum needs for meeting the requirements of 30 TAC section 309.12 in terms of wastewater emergency provisions, which is the section that the Emergency Plan is ultimately supposed to address. While OPIC has serious concerns about the reservation of design specifications approval to a time when the public is no longer involved, 30 TAC, Chapter 317 is generally not the subject of concern in this proceeding. However, section 309.12 is certainly part of this proceeding. To the extent that the ALJ believes the Settling Parties replacement language goes above and beyond the requirements at issue in this proceeding, OPIC suggests that he analyze that language under the standard applicable to this proceeding rather than a future approval process. OPIC submits that, under the applicable standard at issue in this proceeding (30 TAC section 309.12), neither

¹⁷ If the Commission finds it appropriate to include the settlement provision in SP 18, OPIC recommends, at a minimum to revise the Settling Parties requested language to the following: "The permittee shall submit a **Wastewater Treatment Plant (WWTP) Emergency Plan** with the "Plans and Specifications for the WWTP" with the summary transmittal letter required under Special Provision No. 4, above. The Emergency Plan shall address how the facility will meet the requirements in 30 TAC section 309.12(3), regarding **Site Selection to Protect Groundwater or Surface Water**, separation distance from the facility to points of discharge to surface water. The permittee's Emergency Plan submission shall include consideration of emergency storage of effluent and/or containment structures around the treatment plant, emergency power generators, or lift stations in the case of emergency shut down of the plant or failure of the effluent storage tanks. At a minimum, the permittee shall include in its Emergency Plan a spill containment system for the wastewater treatment plant that contains at least 700,000 gallons of wastewater flows, spill containment devices for the lift stations within the Bee Creek Watershed, a backup power generator integrated into the electrical control system of the wastewater treatment plant, and backup power generators integrated into the electrical control systems of the lift stations in the Bee Creek Watershed, and equip the electrical control systems of the wastewater treatment plant and the lift stations in the Bee Creek Watershed with autodial equipment and with visual and auditory alarm systems that activate in the event of a power outage."

¹⁸ PFD, page 18.

the Applicant nor any of the Settling Parties provided any discussion on the record as to what language should be included in the permit to be enforced by the ED. Therefore, as the specific provisions requested to be part of the draft permit's SP 18 could conflict with the ED's future approval process and the record provides no discussion of what emergency measures should be taken at various locations throughout the facility site, OPIC continues to disagree that the revised terms are appropriate for inclusion in the permit, though the parties are free to agree as to what should be included in the Applicant's Emergency Plan to be reviewed by the ED.

II. CONCLUSION

For the reasons stated above, OPIC respectfully requests that the ALJ and the Commission not delete SP 17 and 18. However, if the Commission finds that further regulatory certainty is needed in SP 17, OPIC recommends the changes set out above in footnote 11. In addition, if the Commission finds that it is appropriate to include the proposed changes to SP 18, then OPIC requests that the Commission consider OPIC's suggested changes to that language as set out above in footnote 17.

Respectfully submitted,

Blas J. Coy, Jr.
Public Interest Counsel

for By Vic McWhorter
Emily A. Collins
Assistant Public Interest Counsel
State Bar No. 24045686
P.O. Box 13087
Austin, TX 78711-3087
(512) 239-6823 (TEL)
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CERTIFICATE OF SERVICE

I hereby certify that on May 14, 2007, the original of the Office of the Public Interest Counsel's Exceptions was filed with the Chief Clerk of the TCEQ and a copy was served to all persons listed on the attached mailing list via hand delivery, facsimile transmission, Inter-Agency Mail or by deposit in the U.S. Mail.

Vic McWherter
Vic McWherter

MAILING LIST
LAZY NINE MUNICIPAL UTILITY DISTRICT AND
FOREST SWEETWATER LIMITED PARTNERSHIP
SOAH DOCKET NO. 582-06-2596
TCEQ DOCKET NO. 2006-0688-MWD

The Honorable William G. Newchurch
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State Office of Administrative Hearings
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Stuart and Alanya Berthiaume, Mr. and Mrs.
Michael Pfluger*

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Partnership; Lazy Nine Municipal Utility*

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OPIC's Attachment A

Kathleen Hartnett White, *Chairman*
Larry R. Soward, *Commissioner*
Martin A. Hubert, *Commissioner*



Blas J. Coy, Jr., *Public Interest Counsel*

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

January 29, 2007

Hon. William G. Newchurch
Administrative Law Judge
State Office of Administrative Hearings
300 West Fifteenth Street
Austin, TX 78701

CHIEF CLEANS OFFICE

277 JAN 29 PM 2:42

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

Re: Application of Lazy Nine Municipal Utility District and Forest City Sweetwater Limited Partnership for Proposed Permit WQ0014629001
SOAH Docket No. 582-06-2596
TCEQ Docket No. 2006-0688-MWD

Dear Judge Newchurch:

Enclosed for filing in the above-referenced matter is the Office of Public Interest Counsel's Closing Argument.

Sincerely,

A handwritten signature in cursive script, reading "Emily A. Collins".

Emily A. Collins, Attorney
Office of Public Interest Counsel

Cc: Mailing List

Enclosure

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P.O. Box 13087 • Austin, Texas 78711-3087 • 512/239-1000 • Internet address: www.tceq.state.tx.us

SOAH DOCKET NO. 582-06-2596
TCEQ DOCKET NO. 2006-0688-MWD

7:07 JAN 25 PM 2:42

APPLICATION OF LAZY NINE	§	BEFORE THE STATE OFFICE
MUNICIPAL UTILITY DISTRICT AND	§	CHIEF CLERK'S OFFICE
FOREST CITY SWEETWATER	§	OF
LIMITED PARTNERSHIP FOR	§	
PROPOSED PERMIT NO. WQ0014629001	§	ADMINISTRATIVE HEARINGS

THE OFFICE OF PUBLIC INTEREST COUNSEL'S CLOSING ARGUMENT

TO THE HONORABLE ADMINISTRATIVE LAW JUDGE:

COMES NOW, the Office of Public Interest Counsel (OPIC) of the Texas Commission on Environmental Quality (TCEQ or Commission), and submits the following Closing Argument in the above-captioned matter and would respectfully show the following:

I. INTRODUCTION AND BACKGROUND

The Lazy Nine Municipal Utility District (hereinafter "Lazy Nine" or "Applicant") applied for a permit for a wastewater treatment facility irrigation permit on June 7, 2005.¹ The Applicant has proposed to locate the facility approximately 6.2 miles west of the Village of Bee Cave near State Highway 71 in Travis County to serve the Sweetwater subdivision.² The proposed activated sludge process plant treatment units include bar screen, aeration basin, final clarifier, aerobic sludge digester, and chlorine contact chamber. The proposed facility in the Interim I Phase will include a storage pond with a surface area of 2.5 acres and capacity of 64.5 acre-feet for storage of treated effluent prior to irrigation. The proposed facility in the Interim II and Final Phase will include two storage ponds with a total surface area of 5 acres and a total

¹ Applicant's Ex. 3, Miertschin Ex. 2.

² Technical Summary and Executive Director's Preliminary Decision, Applicant's Ex. 8, Vahora Ex. 2.

capacity of 129 acre-feet for storage of treated effluent prior to irrigation.³ The draft permit authorizes disposal of treated domestic wastewater at a maximum daily average flow of 0.18 million gallons per day via surface irrigation of 73.3 acres of non-public access rangeland in the Interim I Phase, 0.44 MGD via surface irrigation of 179 acres of non-public access rangeland in the Interim II Phase, and 0.70 MGD via surface irrigation of 285 acres of non-public access rangeland in the Final Phase.⁴ The Applicant proposes to dispose of its treated wastewater via irrigation to a disposal site in the drainage basin of Barton Creek in Segment No. 1430 of the Colorado River Basin.⁵

The Executive Director (ED) received Lazy Nine's permit application on June 8, 2005, and declared the application administratively complete on July 29, 2005.⁶ Lazy Nine published a Notice of Receipt of Application and Intent to Obtain a Water Quality Permit on August 4, 2005, in the *Austin American-Statesman*.⁷ The Applicant published a Notice of Application and Preliminary Decision on April 23, 2006, in the *Austin American-Statesman*.⁸ The Applicant published notice of a Public Meeting on the proposed Water Quality Land Application Permit on June 23, 2006, in the *Austin American-Statesman*,⁹ and a public meeting was held on July 25,

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ Applicant's Ex. 3, Miertschin Ex. 3.

⁷ Applicant's Ex. 3, Miertschin Ex. 4.

⁸ Applicant's Ex. 3, Miertschin Ex. 3.

⁹ *Id.*

2006. The ED mailed his Response to Public Comment on September 22, 2006.¹⁰ On May 17, 2006, the Applicant requested a direct referral¹¹ to the State Office of Administrative Hearings pursuant to 30 TAC section 55.210(a) for a hearing on "whether the application complies with all applicable statutory and regulatory requirements."¹²

II. TERMS AND CONDITIONS OF THE PERMIT

A. Preliminary Irrigation Management Plan

The Applicant submitted a "Preliminary Irrigation Management Plan" as part of its direct case in this matter "because people were clamoring for it."¹³ Dr. Miertschin testified that the Preliminary Plan submitted into the record was preliminary rather than "Final" because the Applicant is still deciding what type of irrigation equipment to use.¹⁴ The City of Austin's engineer testified that the Irrigation Management Plan and Vegetation Management Plan should be substantially complete before issuance of the permit to allow for public review of the plans.¹⁵ Mr. Peacock further states that he is concerned that "changes in the design or operation will invalidate the water and nutrient balance or other protections that are only outlined in these plans."¹⁶

¹⁰ Applicant's Ex. 3, Miertschin Ex. 7.

¹¹ Applicant's Ex. 3, Miertschin Ex. 3.

¹² 30 TAC § 55.210(b) (2006).

¹³ Tr. at 372.

¹⁴ Tr. at 376.

¹⁵ Peacock Profile, City Ex. 1, page 5.

¹⁶ *Id.*

While the Applicant submitted the Plan as part of its direct case, OPIC sees no legal means to make the Preliminary Plan binding by mere discussion on the record. There are often unclear boundaries between requirements necessary for inclusion in a permit, and thereby litigated during a contested case hearing, and the information required for future approvals.¹⁷ For example, while TCEQ rules leave design criteria and irrigation management approvals to another date,¹⁸ the draft permit includes SP 11, which requires the permittee to design spray fixtures to disallow operation by unauthorized personnel. Requiring a specific management practice or design criteria in the permit, however, does not open the floodgates to hold a contested case hearing on all irrigation management needs and design criteria. However, the Preliminary Irrigation Management Plan provides useful information pertinent to issues that are clearly relevant to this proceeding, including the potential for a discharge to surface water and the ability of the Applicant to comply with certain requirements in the draft permit. In such instances, OPIC has cited to the Preliminary Plan in this Closing Argument.

B. Settlement Agreement

The Applicant, the City of Austin, and LCRA (hereinafter "settling parties") entered into a settlement agreement whereby those parties agree to issuance of the draft permit with several

¹⁷ TCEQ rules often do not make the timing of design and construction approvals clear. 30 TAC section 309.12 requires the Commission to evaluate a proposed site's minimization of possible contamination of surface water and groundwater in light of any *proposed* design, construction or operational features. 30 TAC section 309.12 does not give any indication that a proposed design, no matter how detailed or final, should or should not be considered as part of the wastewater permitting approval process. Texas Water Code (hereinafter "TWC") section 26.034 requires submission of completed plans and specifications of disposal systems only "before beginning construction," and directs the Commission to develop rules for the review and approval of plans and specifications of such facilities. 30 TAC section 317.1 implements the mandate in TWC section 26.034, and is equally vague in the necessary timing for submission of final plans.

¹⁸ TWC § 26.034 (2006); 30 TAC § 317.1 (2006).

changes. The same three parties transmitted the settlement agreement to the ALJ and the other parties via an "Agreed Motion" that requests the ALJ "to issue a proposal for decision that recommends approval of the draft permit...with the changes agreed to by the parties..." in the settlement agreement.¹⁹ The three parties agreed to changes to Special Provisions 16, 17, 18, 20, and 22. As provisions to be incorporated into a permit and proposed and supported by an ALJ's findings of fact and conclusions of law, rather than a simple agreement enforceable only among the parties, the agreed upon changes must have some basis in the record and must include language that the Executive Director can actively enforce. OPIC evaluates each of the specific requests from the settlement agreement below.

1. Special Provision 16

Special Provision (hereinafter "SP") 16 of the draft permit, as submitted by the Executive Director of the TCEQ, requires that the permittee submit a Final Irrigation Management Plan to the TCEQ Water Quality Assessment Team for approval or modification prior to any application of wastewater to the permitted area. The Applicant, the City, and LCRA have agreed to include language in SP 16 that requires the Applicant to submit its Final Irrigation Management Plan to TCEQ at least 120 days prior to application of wastewater to the irrigation field.²⁰ The City of Austin provided testimony that submission of the Plan 120-days prior to wastewater irrigation will ensure that effluent application rates and irrigation practices are commensurate with supporting plant growth and avoiding off-site losses of effluent in surface water runoff or

¹⁹ Agreed Motion of Lazy Nine MUD, Forest City Sweetwater Limited Partnership, the Colorado River Authority, and the City of Austin, Texas, in SOAH Docket No. 582-06-2596, filed December 12, 2006 (hereinafter "Agreed Motion").

²⁰ Agreed Motion, Exhibit B.

leaching of effluent below the root zone.²¹ Presumably, ED staff will review the Plan to ensure that effluent application rates and irrigation practices support plant growth and avoid a runoff or leaching of effluent whether the Plan is submitted 120 days prior to initiation of effluent irrigation or, simply, prior to initiation of the application of effluent to the irrigation field. While the Draft Permit does not appear to prohibit early submission of the Final Irrigation Management Plan, no party has provided a basis in the record for TCEQ to expend its resources to enforce any early submission of the Plan.

2. Special Provision 17

The settling parties have moved to delete Special Provision 17 from the permit. SP 17 requires that "should the permittee develop athletic fields using wastewater, the permittee shall revise the permit, in a major amendment application, to indicate irrigation on public access land and include the athletic fields as part of the area to be irrigated with the effluent." The provision also requires submission of a revised Final Irrigation Management Plan to accompany the major amendment application. SP 17 details specific information needed by staff as part of the Plan to complete the amendment application. Domestic Worksheet 3.0 of the application states that the proposed land use in the land application area is "rangeland with native grass, junipers, hardwood, and athletic fields."²² In addition, the Supplemental Technical Report for Irrigation Disposal in the application states that "[a] relatively small fraction of the tract may be developed

²¹ Prefiled Testimony of Joan I. Balogh, PSS, CPSSc on Behalf of the City of Austin, November 20, 2006, City's Ex. 5, page 5.

²² Applicant's Ex. 3, Miertschin Ex. 2, Worksheet 3.0.

as athletic fields in the future.”²³ According to a March 31, 2006, letter from the Executive Director to the Applicant, the Applicant requested that the ED revise SP 17 to allow the submission of a letter of notification upon development of the athletic fields that would include a revised Final Irrigation Management Plan.²⁴ The ED provided the following response²⁵ to the Applicant’s request detailing his concern regarding the mention of athletic fields in the application:

The current permit application only mentions athletic fields, but does not provide any other details in the technical reports, attachments or maps. Consequently, the evaluation of the permit application does not include any proposed athletic fields. We have no knowledge, for example, of the location and size(s) of the proposed fields. A letter of notification cannot amend a permit. Further, inclusion of the athletic fields to be authorized in a permit by simple notification bypasses the public notice step. Consequently, the current language in Special Provision No. 17 is retained.

OPIC acknowledges that the draft permit, even without SP 17, does not authorize irrigation of athletic fields, or “public access lands.” The permit only authorizes irrigation of “non-public access lands” in all phases.²⁶ The City of Austin expressed concern that SP 17 is redundant and “gives a false impression that a subsurface drip system has been reviewed and

²³ *Id.* at Attachment K, 1.2.

²⁴ Letter from Julian D. Centeno, Permit Coordinator, Municipal Permits Team, Wastewater Permitting Section, Water Quality Division, TCEQ to Mr. Mike Willatt regarding Lazy Nine Municipal Utility District and FC Sweetwater Partner, LLC, Draft TCEQ Permit No. WQ0014629001, dated March 31, 2006, page 3.

²⁵ *Id.*

²⁶ Agreed Motion, Settlement Agreement, Exhibit A, page 1; *see also* 30 TAC § 309.20(b)(1) (2006) (requiring a certain degree of treatment for land accessible to the general public); Email communication from James Miertschin to Julian Centeno, dated June 30, 2006, re: Lazy Nine MUD comments, Applicant’s Ex. 3, Miertschin Ex. 3, Volume 1 (stating that “[t]he proposed irrigation area will be fenced to discourage public access, and signage will be provided to prohibit trespassing and state that irrigation with reclaimed water occurs”).

approved for the site.”²⁷ However, given the dialogue that occurred between the Applicant and the ED as well as the vague references to athletic fields in the application, OPIC does not find any harm in the inclusion of SP 17 in the permit. OPIC also does not agree that the requirement to apply for a major amendment upon development of athletic fields implies that a subsurface drip irrigation system has been reviewed and approved. Indeed, SP 17 requires a major amendment application accompanied by a revised Final Irrigation Management Plan that includes information regarding the “irrigation delivery method (spray or subsurface)” for review and approval.²⁸ In addition, SP 17 serves both the public interest and the Applicant’s interest in regulatory certainty. SP 17 details exactly what needs to occur for the Applicant to irrigate athletic fields in the future, and, thereby, puts the Applicant on notice as to its responsibilities and allows the public to have clear expectations of what may occur at the site. SP 17 also provides a clearly understandable enforcement mechanism for staff. Therefore, OPIC finds no reason in the record to delete SP 17 as requested by the settling parties.

3. Special Provision 18

Currently, SP 18 of the draft permit provides that the Applicant must submit a Wastewater Treatment Plant Emergency Plan to TCEQ that addresses how the facility will meet the 30 TAC section 309.12(3).²⁹ The provision requires the permittee to “consider the case of emergency storage of effluent and/or containment structures around the treatment plant,

²⁷ Prefiled Testimony of Edward D. Peacock, P.E. on Behalf of the City of Austin, November 20, 2006, City Ex. 1, page 4, number 3.

²⁸ Agreed Motion, Settlement Agreement, Exhibit A, pages 23-24.

²⁹ *Id.* at page 24.

emergency power generators, or lift stations in the case of emergency shut down of the plant or failure of the effluent storage tanks.”³⁰ The settling parties have requested the ALJ to revise the sentence quoted above³¹ to state the following:

The Applicant will provide a spill containment system for the wastewater treatment plant that will contain at least one day's volume of wastewater flows (700,000 gallons), spill containment devices for the lift stations that are in the Bee Creek Watershed, a backup power generator integrated into the electrical control system of the wastewater treatment plant, and backup power generators integrated into the electrical control systems of the lift stations in the Bee Creek Watershed, and will equip the electric control systems of the wastewater treatment plant and the lift stations in the Bee Creek Watershed with autodial equipment and with visual and auditory alarm systems that will activate in the event of a power outage.

While the settling parties certainly addressed the components of emergency operations discussed in the last sentence of SP 18 and the proposed revision does not revoke the requirement that the permittee submit an Emergency Plan to the ED, OPIC is concerned that the ED's final approval of the design criteria (including the Emergency Plan) and the requested permit provision may conflict with each other.³² It is certainly possible that the ED may approve each of the proposed emergency control measures proposed by the settling parties upon submission of the summary transmittal letter. However, OPIC cannot support a permit revision that would potentially conflict with a future approval process. As currently written in the draft permit, the last sentence of SP 18 simply provides Emergency Plan submission requirements.

³⁰ *Id.*

³¹ Agreed Motion, Exhibit B, page 2.

³² SP 18 requires the Emergency Plan to be included with the “summary transmittal letter required under Other Requirement Item 4 above.” OPIC reviewed the draft permit to try to locate “Other Requirement Item 4,” and believes that the ED was referring to SP 4, which requires submission of a summary transmittal letter in accordance with 30 TAC section 317.1. The ED must approve plans and specifications submitted, including the summary transmittal letter, pursuant to 30 TAC section 317.1(a)(3)(D), (E), (4) (2006).

with a description of the information needed to complete the Emergency Plan portion of the summary transmittal letter. The settling parties cannot attempt to bypass the Chapter 317 design criteria approval process by simply mandating their preferred design in a permit approval process in which the ED is not participating. Therefore, OPIC cannot agree that their terms are appropriate for inclusion in the permit, though the parties are free to agree as to what should be included in the Applicant's Emergency Plan to be reviewed by the ED.

4. Special Provision 20

Currently, SP 20 of the draft permit³³ requires the following:

Vegetation shall be established and well maintained throughout all months of the year. The permittee shall establish and maintain Common Bermuda grass or other managed cover grasses in the application areas and over-seed with rye grass to maintain an annual vegetative cover. Common Bermuda grass will be cut to maintain a maximum grass height of 10 inches and a minimum grass height of 4 inches. Grass cuttings shall be removed from the application areas. Any areas that will receive wastewater and contain surface rock fragments greater than 50% shall be amended with fill soil to support and maintain vegetation cover throughout the year.

The ED changed the originally proposed language in SP 20 allowing a cover crop of native grasses due to various public comments regarding nutrient concerns. In the ED's Response to Public Comment (hereinafter "RTC"), he states that the "vegetative cover has been expanded to include common Bermuda grass to ensure crops capable of utilizing the effluent nitrogen without accumulation in the root zone (Special Provision No. 20)."³⁴ Before the draft

³³ Agreed Motion, Settlement Agreement, Exhibit A, page 24.

³⁴ Applicant's Ex. 3, Miertschin Ex. 7, Executive Director's RTC, dated September 22, 2006, Response 10. The ED further states that the growing and harvesting of common bermuda grass "ensures that a crop nitrogen requirement of more than 100 lbs total nitrogen per acre per year, which can utilize the nitrogen in the effluent, can be achieved." *Id.* at Response 11.

permit was revised in the RTC, the draft permit contemplated irrigated crops to consist of native grass, junipers and hardwood, and SP 20 required over-seeding of a cool season grass during cool-season dormancy of native grasses to ensure proper nutrient uptake during that season.³⁵ SP 20 also required, and currently requires, that the permittee amend areas of the irrigation field that have surface rock fragments greater than 50% with fill soil "to support and maintain vegetation cover over an annual schedule."³⁶

The settling parties request revisions to SP 20³⁷ to state the following:

Vegetation shall be established and well maintained throughout all months of the year. The permittee shall plant a mix of tall and mid grasses, primarily but not wholly consisting of grasses and forbs that are native to the area, including by way of example, Big bluestem, switch grass, Indian grass, little bluestem, side oats gamma, Green Sprangletop, Texas winter grass, and eastern gamma grass in the applicable areas to maintain an annual vegetative cover. Grasses will be cut at least annually. Grass cuttings shall be removed from the application areas. Any areas that will receive wastewater and contain surface rock fragments greater than 50% shall be irrigated in a manner that will prevent surface runoff from the permitted area.

The combined testimony of Dr. Wilding, Dr. Wilcox, and Dr. Woodruff provide ample support for the request to revise SP 20 to require a mix of native grasses rather than a common bermuda cover crop. Dr. Wilcox, a rangeland ecologist with a specialty in eco-hydrology, recommends use of a mix of native and introduced vegetation to consume the nitrogen from the effluent.³⁸ Based on field studies, Dr. Wilcox observed King Ranch Bluestem (hereinafter

³⁵ Applicant's Ex. 8, Vahora Ex. 2, Draft Permit, Page 24.

³⁶ *Id.*; Agreed Motion, Settlement Agreement, Exhibit A, page 24.

³⁷ Agreed Motion, Settlement Agreement, page 2.

³⁸ Prefiled Testimony of Dr. Bradford P. Wilcox on Behalf of the Applicants, October 30, 2006, Applicant's Ex. 10, page 15.

"KRB"), an introduced species, already established on the irrigation site.³⁹ As KRB is highly productive and already established, Dr. Wilcox recommends the use of KRB instead of common Bermuda, thinning of cedar already on site, maintenance of oak trees, and overseeding of a mix of native grasses and forbs.⁴⁰ Dr. Wilcox describes the use of native vegetative cover and well-adapted introduced species as beneficial both ecologically and hydrologically.⁴¹ According to Dr. Wilcox, while common bermuda may require the addition of nutrients beyond that included in the irrigation effluent, a mix of herbaceous plants and trees will consume the nutrients applied throughout the soil profile and restore the natural cover conditions to lower the flooding potential and result in "cleaner" stormwater in the stream channel and lessen erosion.⁴²

In addition, Dr. Wilding testified that the soil depths occurring in the irrigation field "are adequate to support a vigorous growth of vegetation given amendments of fertilizer indigenous to the wastewater products and added supplemental water to overcome periods of soil moisture deficiencies during drought prone climatic periods."⁴³ With regard to the sufficiency of the soil to deal with nutrients, Dr. Wilding testified that the soils on the irrigation site are "often 50 percent or more calcium carbonate equivalent" and immediately absorbs phosphorus very close to the surface.⁴⁴ Without the presence of erosion, the high phosphorus absorbency in the soils

³⁹ *Id.*

⁴⁰ *Id.* at 15-17.

⁴¹ *Id.* at 16-17.

⁴² *Id.* at 16.

⁴³ Applicant's Ex. 1, Prefiled Testimony of Dr. Larry Wilding on Behalf of the Applicants, October 30, 2006, page 43.

⁴⁴ Tr. at 124-127.

prohibits the movement of phosphates to surface or groundwater.⁴⁵ Furthermore, Dr. Wilding testified that the soils on the site are in desperate need of water, nitrates, and phosphates.⁴⁶ While Dr. Wilcox described the application rate of nitrogen on the irrigation site as somewhere between 66 and 80 pounds per acre,⁴⁷ Dr. Wilding stated that sites on the irrigation field that he observed could accommodate “up to 150 pounds of added nitrogen on a yearly basis”⁴⁸ if the application rate and dosing schedule cited in the preliminary irrigation management plan are followed.⁴⁹ Dr. Wilcox’s prefiled testimony cites a nitrogen load in the effluent of 63 pounds per acre per year and an annual nitrogen uptake for the proposed native and introduced vegetative cover of approximately 100 pounds per acre.⁵⁰

The Applicant also put on expert testimony regarding the expected movement of water on the irrigation site that supports revision of SP 20 to require a mixed cover crop of native vegetation and introduced species. Dr. Wilding testified that an aquitard underlying the site prevents movement of water into groundwater and acts as a perched water table that reduces nitrates to gases before they would mobilize to surface or groundwater.⁵¹ Similarly, Dr. Woodruff testified that low-permeability bedrock layers will restrict water to lateral, rather than

⁴⁵ *Id.*

⁴⁶ Tr. at 56-57.

⁴⁷ Tr. at 309, lines 5-17.

⁴⁸ Tr. at 57.

⁴⁹ Tr. at 60-66. *See also* Applicant’s Ex. 1, Wilding Ex. 8.

⁵⁰ Wilcox Prefile, Applicant’s Ex. 10, page 19.

⁵¹ Tr. at 137-141.

vertical, movement.⁵² However, Dr. Woodruff expects, and Dr. Wilcox and Dr. Wilding seem to agree, that deep-rooted vegetation, such as larger grasses, oak and cedar trees requested in the SP 20 proposed revision will intercept moisture and nutrients in these lateral movement zones.⁵³ Based on the testimony provided by Dr. Wilcox, Dr. Woodruff, and Dr. Wilding, OPIC supports the settling parties requested revision of SP 20 regarding the appropriate cover crop for the irrigation field.

The record also supports removal of the language requiring soil amendments in areas with surface rock fragments greater than 50%. Dr. Wilding testified that the addition of topsoil to the surface rock fragments will have a host of negative effects on soil hydrological function, soil stability, and erosion due to the formation of a hydrological barrier between the natural soil surface and amended materials.⁵⁴ Dr. Wilcox believed that importation of soil would "likely set back vegetation production" on the site.⁵⁵ Furthermore, Dr. Wilding stated that the rock fragments referenced in SP 20 are actually fragments of decomposed secondary cemented caliche or soft limestone fragments that have "water retention and other soil qualities favorable for remediation of treated spray effluents."⁵⁶ Rather than provide soil amendments for these areas, Dr. Wilding recommends using the native soil conditions and reducing the effluent application dosing rates from one-inch per day to "a lesser number" to appropriately

⁵² Prefiled Testimony of Dr. Charles Woodruff, Jr., on Behalf of the Applicants, October 30, 2006, Applicant's Ex. 6, page 11.

⁵³ *Id.*; Wilcox Profile, Applicant's Ex. 10, page 16; Tr. at 137.

⁵⁴ Wilding Profile, Applicant's Ex. 1, page 45.

⁵⁵ Wilcox Profile, Applicant's Ex. 10, page 13.

⁵⁶ Wilding Profile, Applicant's Ex. 1, page 45.

accommodate areas with over 50% rock cover.⁵⁷ Dr. Wilding stated during cross-examination that the nominal effluent application rate of 0.5 inch per day, followed by two days rest, with adjustments to the effluent application rate and dosing schedule during the summer and winter seasons, provides an irrigation management approach that is consistent with the capability of the soils and vegetation on the site to accommodate the effluent application rate throughout the entire irrigation site.⁵⁸

Furthermore, Dr. Wilcox testified on rebuttal that "the presence or absence of rocks on the surface is not necessarily a good indicator of soil depth or soil infiltration capacity."⁵⁹ Perhaps the most persuasive testimony that the soil amendment language should be deleted and irrigation should be allowed in areas with stony soil conditions came from Dr. Wilding's rebuttal testimony. Dr. Wilding testified that "[i]rrigated effluents that may strike the rock surfaces will run off, but will be immediately absorbed by adjacent soil conditions."⁶⁰ Dr. Wilding further testified that "[a]djacent soils may have limited water holding capacities but water transmission characteristics are excellent and sometimes better than soils with fewer stones. In areas where soils have lower water retention capacity, we have already reduced effluent application rates to accommodate these conditions."⁶¹ Dr. Carlile, for LCRA, appears to agree that the infiltration rates of the soil will allow irrigation as proposed in the Preliminary Plan over the entire irrigation

⁵⁷ *Id.*

⁵⁸ Tr. at 65, lines 7-14, 66, lines 8-24; *see also* Rebuttal Testimony of Dr. James Miertschin, P.E., on Behalf of the Applicants, December 13, 2006, Applicant's Ex. 13, Miertschin Rebuttal Ex. 1, page 2 (providing a summary of the reasons that variable effluent dosing zones are not appropriate).

⁵⁹ Rebuttal Testimony of Dr. Bradford P. Wilcox on Behalf of the Applicants, December 7, 2006, Applicant's Ex. 11, page 4.

⁶⁰ Applicant's Ex. 2, page 4.

⁶¹ *Id.*

field.⁶² While Dr. Carlile testified that the Applicant may need to include information in the Final Irrigation Management Plan regarding the ability of any proposed irrigation application equipment to appropriately apply effluent to steep slopes, this testimony appears to be based on the need to isolate zones where lower "loading rates" are needed.⁶³ Dr. Wilding and Dr. Wilcox's testimony cited above, however, establishes that the worst-case scenario application rate proposed in the Preliminary Plan can be applicable over the entire field without the need for isolated zones with lower application rates. If any doubt exists that the steep slopes and shallow soils should have the same application rate as the rest of the irrigation field, OPIC suggests including a special provision in the permit to require the Applicant to submit information in the Final Irrigation Management Plan regarding the ability of any proposed irrigation application equipment to appropriately apply effluent to those potentially sensitive areas.

The sum of testimony from Dr. Wilding and Dr. Wilcox shows that the presence of rocky soil does not necessarily indicate either soil depth or soil infiltration capacity. Therefore, not only would soil amendments result in erosion and other soil conditions unable to appropriately accommodate the effluent applied, but the application rate for the entire irrigation site, including areas with over 50% surface rock cover, should not result in the migration of nutrients to groundwater or surface water. Accordingly, OPIC agrees with the settling parties that the language in SP 20 regarding soil amendments should be removed.

⁶² Prefiled Testimony of Dr. Robert Carlile, LCRA Ex. 1, page 6.

⁶³ Tr. at 672, lines 2-8.

5. *Special Provision 22*

The last requested change by the settling parties deals with the expansion and addition of buffer zones within the wastewater application site. Currently, the draft permit prohibits application of effluent⁶⁴ on the following areas:

- (a) A 200-foot buffer between wastewater application and the centerline of Little Barton Creek or the width of the 100-year floodplain, whichever is greater;
- (b) A 50-foot buffer between wastewater application and the centerline of the two intermittent streams and valley area or the width of the 100-year floodplain, whichever is greater.

The settling parties have requested that the ALJ revise SP 22 to require a 210-foot buffer between wastewater application and the centerline of Little Barton Creek where the width of the floodplain is not greater. The settling parties have also requested the addition of two more areas where effluent application would be prohibited: (1) 150 feet from the center of a "wetland" area south of the ranch building, and (2) a 1.9 acre area in the northwest corner of the irrigation field that consists of an outcrop of broken rock. Although not associated with the settlement agreement, Dr. Miertschin also testified that the Applicant also has plans to exclude areas of the irrigation field with a 12 percent gradient or greater from any application of effluent.⁶⁵

Adding and expanding buffer zones is generally more protective of human health and the environment, however, these proposed revisions raise concerns regarding the reduction of acreage for irrigation acreage available. Dr. Miertschin's Supplemental Technical Report for Irrigation Disposal⁶⁶ states that "[t]he effluent application rate from the water balance analysis is

⁶⁴ Agreed Motion, Settlement Agreement, Exhibit A, page 25.

⁶⁵ Tr. at 474-475.

⁶⁶ Applicant's Ex. 3, Miertschin Ex. 2, Attachment K, 2.1 Water Balance, Minimum Irrigation Area (page 3).

used to determine the minimum irrigation area needed for a specific design flow.” Dr. Carlile testified that irrigation acreage constitutes part of a basic calculation to determine the application rate.⁶⁷ Furthermore, the ED has requested clarification as to the exact number of acres that the Applicant proposes to irrigate.⁶⁸ Accordingly, OPIC is uncertain as to whether irrigation field acreage can simply be changed without further analysis of the effects on other parts of the application and the draft permit.

Even as late as the second day of the hearing, Dr. Miertschin testified that 285 acres will be available for irrigation after all the buffers are taken into account.⁶⁹ While the settlement agreement was executed only a few days earlier than the hearing, the draft permit also considered the availability of a 285-acre irrigation field. Clearly, Dr. Miertschin was not accounting for the reduced acreage of the irrigation field included in the settlement agreement in answering Mr. Henry’s question at the hearing.⁷⁰ OPIC has concerns that the reduction of acreage available for wastewater irrigation application may affect the effluent application rate. Therefore, OPIC requests that the ALJ either re-open the record for the purpose of allowing the settling parties to establish the effect of the proposed change to buffer zone requirements on available irrigation field acreage and application rates, or deny the requested revisions and additions to SP 22.

⁶⁷ Tr. at 663, lines 23-25, to 664.

⁶⁸ Applicant’s Ex. 3, Miertschin Ex. 5, page labeled A1-2, number 5, page labeled A2-1, number 15.

⁶⁹ Tr. at 474.

⁷⁰ *Id.*

C. Special Provision No. 21

As currently written by the Executive Director's Staff, the Draft Permit's first paragraph of Special Provision No. 21⁷¹ requires the following:

Subsequent to initiation of land application and annually thereafter, the permittee shall obtain representative soil samples from the root zones of the land application area. Composite sampling techniques shall be used. Each composite sample shall represent no more than 80 acres with no less than 15 subsamples representing each composite sample. Subsamples shall be composited by like sampling depth and soil type for analysis and reporting. Soil types are soils that have like topsoil or plow layer textures. These soils shall be sampled individually from 0 to 6 inches, 6 to 18 inches, and 18 to 30 inches below ground level. The permittee shall sample and analyze soils in December to February of each year. Samples shall be taken within the same 45-day time-frame each year.

Dr. Larry Wilding recommended that Special Provision No. 21 of the Draft Permit should be revised to require a soil collection procedure that will provide more representative results than the procedures included in the Executive Director's Draft Permit. Dr. Wilding specifically recommended the following procedure:⁷²

Samples should be collected by genetic horizons so depth trends in soil physical and chemical properties can be determined without confounding among different A, B, and C soil horizon zones. Data from genetic horizon sampling can be recalculated to standard depths of 0-6," 6-12," 12-18" by weighting the results sampled by genetic horizons with the thickness of respective horizons from similar soil types sampled. It is recommended that a licensed Professional Geoscientist with specialization in the area of Soil Science be contracted to conduct the soil sampling requirements.

Upon further questioning, Dr. Wilding stated that the language recommending the use of a Professional Geoscientist was stated only as a recommendation due to the impracticalities of

⁷¹ Agreed Motion, Settlement Agreement, Exhibit A, page 25.

⁷² Prefiled Testimony of Dr. Larry Wilding on Behalf of the Applicants, October 30, 2006, Applicant's Ex. 1, Wilding Ex. 1-8, page 48.

obtaining such a professional with a specialization in Soil Science.⁷³ Dr. Wilding's preference to require the Applicant to use a Professional Geoscientist with a specialization in Soil Science is based on the specialized knowledge needed to perform the mandatory sampling procedure that Dr. Wilding recommends in the revised language.⁷⁴ However, Dr. Wilding also states that as long as sampling is done using genetic horizonation, his original intent to avoid confounding data sets would be accomplished.⁷⁵

While the Applicant's attorney later stated on the record that the Applicant supports revision of the Draft Permit language to include Dr. Wilding's language with the exception of the last sentence,⁷⁶ the Protestants asserted on the record that a licensed Professional Geoscientist should be used due to Dr. Wilding's testimony regarding the heightened ethical standards that such licensure entails.⁷⁷ OPIC agrees that it would preferable to use a Professional Geoscientist with a specialization in Soil Science to conduct the sampling.⁷⁸ However, given the impracticalities and, therefore, unenforceable nature of requiring the use of such a professional

⁷³ Tr. at 26-28.

⁷⁴ *Id.*

⁷⁵ Tr. at 27.

⁷⁶ Tr. at 28-30.

⁷⁷ Tr. at 34.

⁷⁸ TCEQ regulations provide that "[soil s]ampling procedures shall employ accepted techniques of soil science for obtaining representative analytical results." 30 TAC § 309.20(b)(4) (2006). Therefore, OPIC agrees that both the implications of having ethical standards as a Professional Geoscientist as well as the TCEQ requirement to use "accepted techniques of soil science" bode well for requiring a Professional Geoscientist with a specialization in soil science.

when so few are available,⁷⁹ OPIC only recommends that Special Provision 21 include sampling requirements using genetic horizonation with language similar to that proposed by Dr. Wilding. OPIC proposes the following modified language that differs from Dr. Wilding's proposal only to the extent that OPIC finds our language more legally thorough and inclusive. OPIC notes that a good deal of the language proposed below has been adapted from Dr. Wilding's proposal and language provided in the Preliminary Irrigation Management Plan.⁸⁰

Subsequent to initiation of land application and annually thereafter, the permittee shall obtain representative soil samples from the A horizon and upper B horizon of the same genetic type as far as a total depth of 24 inches. Composite sampling techniques shall be used. Each composite sample shall represent no more than 80 acres with no less than 15 subsamples representing each composite sample. Subsamples shall then be composited by genetic horizon and soil type for analysis and reporting. The permittee shall sample and analyze soils between December and February of each year. Samples shall be taken within the same 45-day time-frame each year.

III. CONCLUSION

OPIC respectfully requests that the ALJ incorporate the revisions described above to SP 20 and 21. OPIC also recommends deletion of SP 16, but requests that the ALJ not delete SP 17 and 18. If the ALJ finds that expansion of the buffer zones requested by the settling parties is appropriate, OPIC requests that the ALJ either re-open the record for testimony regarding the effect of expanding the buffer zones on the irrigation acreage and any related effects to the annual effluent application rate.

⁷⁹ OPIC also submits that the Applicant should be encouraged to use a Professional Geoscientist, when possible, by the sheer reality that samples that do not comply with any mandatory genetic horizon sampling procedures in the permit are subject to scrutiny through enforcement by the TCEQ and, possibly, federal citizen suit actions.

⁸⁰ Preliminary Irrigation Management Plan, Lazy Nine Municipal Utility District, Applicant's Ex. 1, Wilding Ex. 8, page 12.

Respectfully submitted,

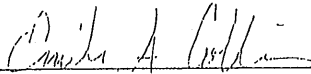
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CERTIFICATE OF SERVICE

I hereby certify that on January 29, 2007, the original of the Office of the Public Interest Counsel's Closing Argument was filed with the Chief Clerk of the TCEQ and a copy was served to all persons listed on the attached mailing list via hand delivery, facsimile transmission, Inter-Agency Mail or by deposit in the U.S. Mail.


Emily A. Collins

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